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Supreme Court of the United States

OCTOBER TERM, 1949.

No. 463

FRED URBUTEIT, CLAIMANT OF 16 ARTICLES OF DEVICE, MORE OR LESS, LABELED "SINUOTHERMIC," PETITIONER,

VS.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Fred Urbuteit prays:

1. That a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit granting the motion of the United States to affirm the decree of the United States District Court for the Northern District of Florida whereby certain articles of device were condemned as misbranded under Section 304 of the Federal Food, Drug and Cosmetic Act, and to review

the judgment of said Court of Appeals denying a petition for a rehearing thereon.

2. That this Court clarify its own opinion of May 2, 1949 (No. 640, October Term, 1948), reported in 69 S. Ct. 840, by removing therefrom an erroneous statement which it derived from false statements in the pleadings and briefs of the United States, and by making it clear to the Court of Appeals that it was not the intent of this Court to compel the granting of the motion of the United States to affirm the judgment of the District Court, but simply to require the consideration of and the judicial determination of the question presented by that motion.

3. That the judgment of the Court of Appeals be reversed and this cause remanded with directions to said Court to hear and consider the motion to affirm on its merits only.

JURISDICTION.

The judgment of the Court of Appeals was entered August 2, 1949, and a petition for rehearing denied September 13, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Whether the Court of Appeals complied with the mandate of this Court in failing to hear and consider on its own merits the motion of the United States to affirm the decree of condemnation, and in granting said motion as a ministerial act *compelled* by the opinion of this Court.

2. Whether the Court of Appeals erred in granting the motion of the United States to affirm the decree of con-

demnation when said motion was based on the theory that testimony offered but erroneously excluded by the District Court, and for which exclusion the District Court was reversed, would have related only to the *therapeutic* value of the devices; when in truth and in fact the excluded testimony was offered for the purpose of proving and would have related to both the *diagnostic* and the *therapeutic* value of the devices.

REASONS FOR ALLOWANCE OF THE WRIT.

In its two earlier appearances before this Court on petitions for certiorari filed by the United States the construction of the Federal Food, Drug and Cosmetic Act as regards shipments of devices and literature in interstate commerce was involved principally. The present petition has no relation to that subject matter. Five members of this Court as at that time constituted construed the Act and although the writer of this petition sincerely believes the reasoning and conclusion of the minority four to be right, this present petition is in no sense an effort to have the question reviewed.

The question with which we are concerned in this petition has arisen because of a false representation made repeatedly in the pleadings and briefs filed in this case by the United States. Hitler developed this vicious art to near perfection and mentions its psychological essentials in his "Mein Kampf."

At the trial in the District Court the Claimant, who is the petitioner here, made a proffer of testimony that was excluded by the District Judge. A part of that proffer is as follows:

> "* * * Claimant further offers to testify as to his diagnosis with the use of the Sinuothermic machine,

and otherwise, with reference to the persons whose testimony as to their treatment would be offered, and to testify as to his treatment of such persons and the results obtained from such treatments" (R. 162, No. 13, October Term, 1948).

It is apparent from the above quoted proffer that the testimony offered but excluded would have dealt with comparative diagnosis of specific cases with the device in question and with other means of diagnosis, and the accuracy of the diagnosis in each instance (diagnosis with the device and diagnosis by other methods) as later determined by treatment and the results obtained therefrom. This testimony, both as to the therapeutic and the diagnostic values of the device, was highly important and the Court of Appeals reversed the District Court for excluding it and the testimony of some thirty patients or former patients of Dr. Urbuteit, the claimant (R. 182-183, No. 13, October Term, 1948).

When the case was brought to this Court on petition for certiorari by the United States the principal question argued had to do with the interpretation of the law but as the case stood reversed on the exclusion of testimony also the petitioner tried to dodge the effect of this reversal. The error was so clear that the reversal based on the exclusion of testimony was not even assigned as error on the part of the Court of Appeals in the petition to this Court. Instead, a twisting and distortion of the record was resorted to, and we find the following language in the Petition for Certiorari (No. 577, October Term, 1947). page 12, under Specification of Errors to Be Urged:

"3. In failing to affirm the judgment of the district court because of false and misleading claims of diagnostic capabilities despite alleged errors in ex-

clusion of evidence offered to show the claimed therapeutic values of the machines.[3]"

and then in the footnote the following language:

"[3]Error is not assigned as to the rulings below with respect to the exclusion of evidence by the trial court. For reasons hereinafter set forth (pp. 18-21), petitioner submits that even if the court below did not err in holding the excluded evidence admissible petitioner is entitled to a judgment of condemnation because of admittedly false representations on an issue to which the excluded evidence did not pertain."

This type of misrepresentation of the record continued from that point on. Without burdening the Court with quotations from each of the documents filed by the Government attorneys we will skip to the Motion to Affirm filed in the Court of Appeals where we find the following language:

"The evidence which this Court held improperly excluded was offered to prove that claims of therapeutic or curative value made for the machines were true (R. 158-163). It had no relationship to the truth or falsity of claims of diagnostic ability" (R. 5, No. 640, October Term, 1948) and also (R. 6, this petition).

This Court apparently did not intend to pass on the merits of the claim of the United States that it was entitled to affirmance of the decree of condemnation because the excluded evidence would not have pertained to the diagnostic value of the device, and for that reason this Court apparently did not make a careful study of the record relating to the use of the device. As a result, this Court was misled and we find in its first opinion this final paragraph:

"The Court of Appeals held that certain evidence tendered by Urbuteit as to the therapeutic or curative

> value of the machines had been erroneously excluded at the trial, a ruling that we are not inclined to disturb. Petitioner claims, however, that the error was not prejudicial. The argument is that since the evidence of the false and misleading character of the advertising as respects the diagnostic capabilities of the machines was overwhelming, that false representation was adequate to sustain the condemnation, though it be assumed that the therapeutic phase of the case was not established. We do not reach that question. Since the case must be remanded to the Court of Appeals, that question and any others that have survived will be open for consideration by it." *U. S. v. Urbuteit*, 335 U. S. 355.

The opinion from which the above quotation is taken dealt principally with the matter of shipment in interstate commerce. When the case was remanded to it the Court of Appeals again reversed the District Court, ordering further investigation into the relationship between advertising and machine shipments, but made no mention of the claim set forth in the above quotation other than to dispose of it in the following sentence:

> "The Supreme Court did not disturb our former ruling that the district court should have heard all the evidence offered on the question of the falsity of the advertising. We adhere to that ruling."

Is there anything in that statement about evidence as to therapeutic value? It is apparent that the Court of Appeals, having studied all the evidence carefully, looked upon the excluded evidence as vital and pertaining to both diagnostic and therapeutic value. Then the case came back to this Court on a second petition for certiorari by the United States and the claim that the Court of Appeals failed to follow the mandate of this Court when it ordered a retrial of the interstate commerce question and in

"failing to consider whether the Government is entitled to a decree of condemnation because of the false character of the advertising matter as respects the diagnostic capabilities of the devices" (No. 640, October Term, 1948, Petition, page 3).

We come now to this Court's last opinion and that part of it which answers the assignment of error just quoted. The same erroneous statement is picked up and used again:

> "On remand the Court of Appeals adhered to its former ruling that the District Court erroneously excluded evidence as to the therapeutic or curative value of the machines. When the case was here before we did not disturb that ruling. But we did leave to the Court of Appeals for consideration a further question —whether the evidence as respects the falsity of the diagnostic capabilities of the machine was adequate to sustain the condemnation even though error in exclusion of the other evidence were conceded. The United States is entitled to a hearing on that question" (No. 640, October Term, 1948). *U. S.* v. *Urbuteit*, 69 S. Ct. 840.

When this opinion reached the Court of Appeals, that Court, with the exception of Judge Sibley, threw in the sponge, without so much as one word of comment:

> "*Per Curiam*: The motion to affirm is granted."

U. S. v. *Urbuteit*, ... U. S. ..... (May 2, 1949) (R. 10). and then Judge Sibley begins his dissenting opinion:

> "My brethren feel compelled by the opinions of the Supreme Court in this case to grant the Government's motion to affirm the decree of the District Court forfeiting the sixteen electric machines seized as misbranded. * * *"

Even Judge Sibley did not realize that this Court did not intend to interpret the evidence but that this Court

had simply erroneously picked up and used the false statement that the excluded evidence did not pertain to the diagnostic value of the device, so he goes on to point out that even admitting false labeling as regards diagnostic value, still a number of machines would not be subject to condemnation without further evidence because they had not been shown to have been represented as useful in diagnosis.

Here is clearly a case of misunderstanding of what was intended. The writer of this petition, having argued the case before both the Court of Appeals and the Supreme Court and having tried it in the District Court, believes that he understands what was in the minds of the members of both the Supreme Court and the Court of Appeals. He believes that the Supreme Court never intended to state as a fact it had adjudicated that the excluded evidence would not have pertained to the diagnostic value of the devices, but that the Supreme Court simply meant to say that here is a question the Government has raised—you pass on it. He also believes that the Court of Appeals interpreted the opinions of the Supreme Court to mean that the excluded evidence would have pertained only to therapeutic and not diagnostic value and that the Court of Appeals must consider only the evidence admitted and not the exclusion of other evidence in passing on the motion of the United States to affirm the decree of condemnation. There certainly was not a "meeting of the minds" of the two Courts on what the opinions of the Supreme Court decided and required.

It is respectfully submitted that unless this Court clarifies its opinions by correctly stating what the record shows to be the nature of the evidence offered and excluded, and by making it clear to the Court of Appeals that this Court had no intention of compelling any action

with relation thereto other than consideration on its merits of the motion to affirm, a gross and irreparable injustice will have been done to the petitioner, Dr. Fred Urbuteit —and a feeling of resentment or something akin to it will linger in the minds of the members of the Court of Appeals. To that end this petition should be granted.

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November, 1949.